

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE: B-211546

DATE: May 6, 1983

MATTER OF: Art Anderson Associates

DIGEST:

Protest that agency should have set aside procurement for small business concerns is summarily denied since, with two exceptions not alleged to exist in this case, there is no legal requirements that a particular procurement be set aside for small business.

Art Anderson Associates (AAA) protests the Department of the Navy's failure to set aside for small businesses its request for proposals N00406-83-R-1563 for Preparation of Technical Publications. AAA asserts that the Navy failed to identify several capable small business sources for this procurement which contributed to its decision not to set aside.

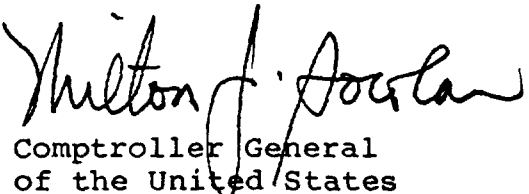
The Small Business Act, 15 U.S.C. § 637, et seq. (1976 and Supp. IV 1980), reflects a national policy of furthering the interests of small business concerns and in awarding a fair portion of Government contracts to such concerns. There are only two situations, however, in which an agency generally is required to set aside a specific procurement for small business concerns. One is where a contract "has an anticipated value of less than \$10,000 and which is subject to small purchase procedures," unless the contracting officer is unable to obtain offers from two or more small businesses that are competitive in terms of price, quality and delivery. 15 U.S.C. § 644(j) (Supp. IV 1980). The other is where a product or service previously has "been acquired successfully by a contracting officer on the basis of a small business set-aside," subject to the expectation that competitive offers at reasonable prices will be obtained. Defense Acquisition Regulation § 1-706.1(f). In all other cases, the decision not to set aside a procurement for small business is discretionary with the contracting officer. Home Therapy Equipment, Inc., B-207714, June 14, 1982, 82-1 CPD 579; Information Marketing, Inc., B-205903, May 25, 1982, 82-1 CPD 497.

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The protester has not alleged that the present procurement is a small purchase or that the items being procured have been acquired successfully under a prior small business set aside. Therefore, we cannot legally object to the Navy's failure to set aside this procurement.

The protest is summarily denied.

for 
Comptroller General
of the United States

DECISION

25055
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-211468**DATE:** May 6, 1983**MATTER OF:** Window Supply Co.**DIGEST:**

Protest filed with GAO more than 10 working days after initial adverse agency action (bid opening) on protest filed with contracting agency is untimely and not for consideration notwithstanding its submission to GAO by certified mail, since certified letter was not mailed not later than the fifth day prior to the final date for timely filing of a protest with GAO.

Window Supply Co. (Window Supply) protests invitation for bids No. DABT02-83-B-0016, issued by Fort McClellan, on the basis that the specifications are restrictive.

We dismiss the protest as untimely filed with our Office.

Window Supply protested the restrictiveness of the specifications to the contracting agency on February 14, 1983. The agency, apparently without formally responding to the protest, opened bids on March 24. Window Supply then protested to our Office by a certified letter, which was mailed on April 6 and received on April 13.

Our Bid Protest Procedures require that where an initial protest has been filed with the contracting agency, in order to be considered by our Office, any subsequent protest to our Office must be filed within 10 working days of the protester's actual or constructive knowledge of the initial adverse agency action taken on that protest. 4 C.F.R. § 21.2(a) (1983). Where alleged improprieties in a solicitation are, as here, properly protested prior to bid opening, we have held that the opening of bids without any action

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having been taken on the protest constitutes constructive notice of initial adverse agency action. Ferguson-Williams, Inc.; Mark Dunning Industries, Inc., B-208927, November 1, 1982, 82-2 CPD 394. The Window Supply protest was not filed with (received by) our Office within 10 working days of bid opening.

While our Bid Protest Procedures permit consideration of a late-filed protest where the protest is submitted to our Office by a certified letter mailed not later than the fifth day prior to the final date for the timely filing of a protest with our Office, 4 C.F.R. § 21.2(b)(3) (1983), this exception to the general rule is not for application here. In order to be timely, the protest should have been received by our Office on April 7. Window Supply mailed its protest by certified mail on April 6, less than 5 days prior to April 7.

The protest is dismissed.

Harry R. Van Cleve
Harry R. Van Cleve
Acting General Counsel